Filed 12/21/09 Linton v. Murray CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DARNICE LINTON, Plaintiff and Appellant, v. DORRIS MURRAY et al., Defendants and Respondents.	A124902 (Alameda County Super. Ct. No. RG08374723)

Plaintiff Darnice Linton appeals from a default judgment entered in his favor against defendant Doris Murray but dismissing with prejudice defendant Donald Murray. Plaintiff also appeals from the denial of his motion for a new trial on the ground of inadequate damages. Defendants, who are in default, have filed no opposing brief, but our review of the record discloses no error and we shall affirm.

Factual and Procedural Background

On March 4, 2008, plaintiff filed a complaint for damages against his landlord, Doris Murray, and her son and property manager, Donald Murray, alleging causes of action for, among other things, breach of the contractual and statutory implied warranty of habitability, negligence and nuisance based on their failure to provide a habitable premises. The complaint alleged that in January 1996 plaintiff rented from defendants an apartment in Berkeley located at 1524 Woolsey Street, apartment B. Plaintiff lived in apartment B until May 2006 when he was relocated to apartment D, where he continued to reside until the end of defendants' ownership and/or management of the property. The complaint alleged that as a result of defendants' failure to maintain the property,

"[c]ertain defects in the property existed and came into existence during [his] tenancy . . . [that] rendered the premises uninhabitable for occupancy by human beings under California common law and statutes." The defective conditions in apartment B included "leaking, missing, and/or inoperable fixtures in the bathroom, incorrectly installed and/or faulty plumbing and/or plumbing fixtures; water damage to ceiling and walls, loose and/or missing tiles, frayed and loose carpet and damaged and/or missing carpet tack strips, sagging and/or structurally deficient floors; broken and/or damaged bedroom door, window, window sill, missing and/or inoperable emergency escape window; lack of adequate and properly working safety equipment; faulty or inoperable appliances; and inadequate heating system." The defective conditions in apartment D included a gas leak and the lack of appliances that resulted from the gas leak. Plaintiff alleged that prior to filing the complaint he made written and oral requests to defendants to repair the defects but that they failed to do so for many years. Defendants' default was entered on October 31, 2008. Plaintiff's request for entry of judgment sought $50,000 in special damages and $50,000 in general damages plus attorney fees and costs.

At the prove-up hearing on January 16, 2009, plaintiff testified that between February 2000 and May 2006 there was raw sewage coming through the bathtub drain. He also indicated that "over the period of 2006 . . . there was a gas problem." Plaintiff testified that his rent at the time of the hearing was $864.96 a month.

On January 22, the court entered judgment in favor of plaintiff against defendant Doris Murray in the amount of $2,800. The court dismissed the action against defendant Donald Murray with prejudice. The court issued a memorandum of decision explaining, "The court can only award damages subject to the relevant statute of limitations, as measured backwards from the date of filing (e.g., two years for breach of a written contract, four years for emotional distress). The complaint was filed March 4, 2008. The time period that is the most pertinent runs from March 4, 2006 through October 5, 2006, when the city inspector stated in a report: 'All cited Housing Code violations noted corrected.' [¶] Plaintiff did not present specific evidence of what the rent he paid each month over the relevant years. It is therefore impossible to grant a retroactive rent

reduction. [¶] The court cannot reconsider issues that have already been adjudicated in earlier actions between the parties. [¶] Only the owner of property can be liable for the things complained about here, not someone who was solely the manager of the property."

On February 17, 2009, plaintiff filed a motion for new trial on the grounds that the damages awarded were inadequate and the decision to dismiss Donald Murray was contrary to the law. First, he argued that "[t]he damages awarded *appear* to be based on a more limited timeframe than that indicated by plaintiff's evidence and pleadings." Citing to the court's statement that " 'the time period that is the most pertinent . . . runs from March 4, 2006 through October 5, 2006,' " he argues that it appears the court did not consider the service reports and hazard notices submitted to the court at the hearing that show gas leaks in mid-December 2006. In addition, he argued that the court erred in dismissing Donald Murray as a defendant in light of the allegations in his complaint that Donald was acting as a landlord and an agent of his mother during the relevant time period.

At the hearing on the motion for new trial, the court reaffirmed its conclusion that Donald Murray is not liable. With respect to the calculation of damages, the court explained that it had awarded plaintiff $400 a month for the "seven months when repairs demanded by the city had not been done." Plaintiff's attorney acknowledged that it was difficult to calculate damages based on "plaintiff's oral testimony, a lot of . . . which . . . was no use to [the] court," but he requested a second hearing "to present any and all documentary evidence to better assist the court in fixing damages, such as rental payment, receipts and any and all declarations or documentary evidence that could [assist] the court in better fixing damage amount." Admitting that the damages requested by plaintiff were "unrealistic," counsel "implore[ed] the court to allow for a new default prove up in which the evidence presented by plaintiff would be in a clearer format." The court denied the motion for new trial and plaintiff filed a timely notice of appeal.

Discussion

After entry of a defendant's default, a plaintiff "may apply to the court for the relief demanded in the complaint. The court shall hear the evidence offered by the

plaintiff, and shall render judgment in the plaintiff's favor for that relief . . . as appears by the evidence to be just." (Code Civ. Proc., § 585, subd. (b).) Thus, the plaintiff must provide evidence of damages to support entry of a default judgment. The plaintiff need only establish a prima facie case to prevail, but the damages awarded may not exceed those prayed for in the complaint. (*Johnson v. Stranhiser* (1999) 72 Cal.App.4th 357, 361-362.) The scope of review on appeal is limited to whether the judgment is totally unconscionable and without evidentiary support. (*Id.* at p. 361.) Likewise, "[w]e will not disturb the trial court's determination of a motion for a new trial unless the court has abused its discretion. [Citation.] When the court has denied a motion for a new trial, however, we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

1. Statute of Limitations

At the prove-up hearing the trial court explained that the applicable statute of limitations is four years and requested that plaintiff focus his testimony on the situation after March 2004. In its memorandum of decision the court explained, "The court can only award damages subject to the relevant statute of limitations, as measured backwards from the date of filing (e.g., two years for breach of a written contract, four years for emotional distress)." Plaintiff notes for the first time on appeal that "[t]he statute of limitations for breach of a residential rental contract, and generally all written contracts, is four years" and that the court "indicates it is using a two-year statute of limitations for breach of written contract." The statute of limitations for breach of a written residential lease is, as plaintiff notes, four years (Code Civ. Proc., § 337, subd. (1)) and the limitations period for a related tort claim is two years (Code Civ. Proc., § 335.1). The court's error in this regard, however, appears to be typographical and undoubtedly would have been corrected had it been raised at the hearing on plaintiff's motion for new trial. As indicated above, at the hearing itself the court stated that the limitations period was four years and requested that evidence be limited to the situation subsequent to March 2004, four years prior to the filing of the complaint.

The court explained at the hearing on the motion for new trial that it could not award a rent reduction, which would be the measure of damages subject to the longer statute of limitations, due to a lack of evidence showing "that he was paying too much" or that he "should have been paying this much rent rather than that rent." With respect to plaintiff's claim for emotional distress damages, the court properly limited the damages to injuries occurring in the two-year limitations period after March 2006.

2. *Damages for Breach of Contract*

In *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, the court cited two measures of damages applicable to an action for breach of the warranty of habitability: "The measure of damages should be the difference between the fair rental value of the premises if they had been as warranted, and the fair rental value as they were during the occupancy in the unsafe or unsanitary condition [citation]. Another reasonable approach is a percentage reduction of use: reducing the tenant's rental obligation by a percentage corresponding to the relative reduction of use of the leased premises caused by the landlord's breach." (*Id.* at p. 915, citing *Green v. Superior Court* (1974) 10 Cal.3d 616, 639, fn. 24.) In this case, plaintiff failed to provide *any* evidence regarding the fair market value of the premises or what percentage of his use was reduced by the defective conditions. Accordingly, the trial court did not err by not awarding damages for breach of contract.

3. *Damages arising after October 2006*

The trial court did not award damages for injuries plaintiff claimed to have suffered after October 2006. Contrary to plaintiff's suggestion, the court's comments do not suggest that it failed to consider evidence relating to injuries incurred after October 2006. The court stated only that injuries that occurred prior to October were the "most pertinent." Substantial evidence supports this conclusion. The letters from the City of Berkeley indicate that code violations at the premises had been corrected by October 2006 and it was recommended that the case be closed. The service reports from the gas company contained in the record show only that gas leaks on the premises were repaired and plaintiff testified only briefly that there were leaks. Based on this evidence, the court

reasonably concluded that the situation with the leaks was not sufficient to warrant an award of damages.

4. *Donald Murray's Liability*

In *Stoiber* the court held that while a tenant could not assert a cause of action based in contract against a landlord's agent, the agent may "be held liable on any properly pleaded tort causes of action." (*Stoiber v. Honeychuck, supra,* 101 Cal.App.3d at pp. 929-930.) In that case, the complaint alleged that as the agent of the owner, the management company "assumed in the course of its agency, functions, duties, and responsibilities of [the owner] . . . , who resides in Connecticut. These duties, responsibilities, and functions include, but are not limited to, the following: 1. Collection of rental payments from the plaintiff; 2. Maintenance and management of the premises.' " (*Id*. at p. 930.) Based on these allegations, the court concluded that "the rental agents owed a duty of ordinary care towards the tenant because the transaction between the rental agent and the landowner was clearly intended to affect the tenants, and because harm would be foreseeable to the tenants if the rental agent did not properly perform his duty. When the owner is located at some distance from the rental property as in the present case (Connecticut), the tenant's only practical recourse is to complain to the rental agent. Imposition of a duty on the rental agent would as a matter of public policy encourage the agent to pass the complaints along to the owner or to take action to properly maintain the property, if this is part of his responsibilities as agreed with the owner." (*Id*. at pp. 930-931.)

In contrast, in this case plaintiff's complaint alleges only that in "the summer of 2005 Donald Murray began acting as a manger and/or as a managing agent and/or owner of the premises" and that he and Doris were "at all relevant times agents and/or employees of [each other] and acted within the scope of the agency and/or employment." The complaint alleges further that "Donald Murray was plaintiff's landlord as that term is

defined under . . . [section] 1980 of the California Civil Code."[1] These allegations are insufficient to support liability based on the finding of a special relationship between Donald Murray and plaintiff. Moreover, plaintiff presented no evidence at the prove-up hearing to establish that Donald Murray's responsibilities brought him within the scope of liability under *Stoiber v. Honeychuck.* Accordingly, the trial court did not err in concluding that each of the causes of action alleged "dealt with the lease or rights under the lease" and to the extent that there was any exception to that "it was never proved that the second individual, Donald Murray, committed a new answer [*sic*]."

Thus, the evidence presented at the prove-up hearing was not such as to compel any larger award of damages, and it was well within the court's discretion to deny plaintiff a second bite at the apple.

Disposition

The judgment is affirmed.

[1] Civil Code section 1980 defines "Landlord" to mean "any operator, keeper, lessor, or sublessor of any furnished or unfurnished premises for hire, or his agent or successor in interest" and "Owner" to mean "any person other than the landlord who has any right, title, or interest in personal property."

_____
Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Jenkins, J.